SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 500

NATIONAL KNITTED OUTERWEAR ASSOCIATION, ET AL.,
Petitioners,

v.

TEXTILE AND APPAREL GROUP, AMERICAN IMPORTERS ASSOCIATION, ET AL.,

and

FEDERAL TRADE COMMISSION,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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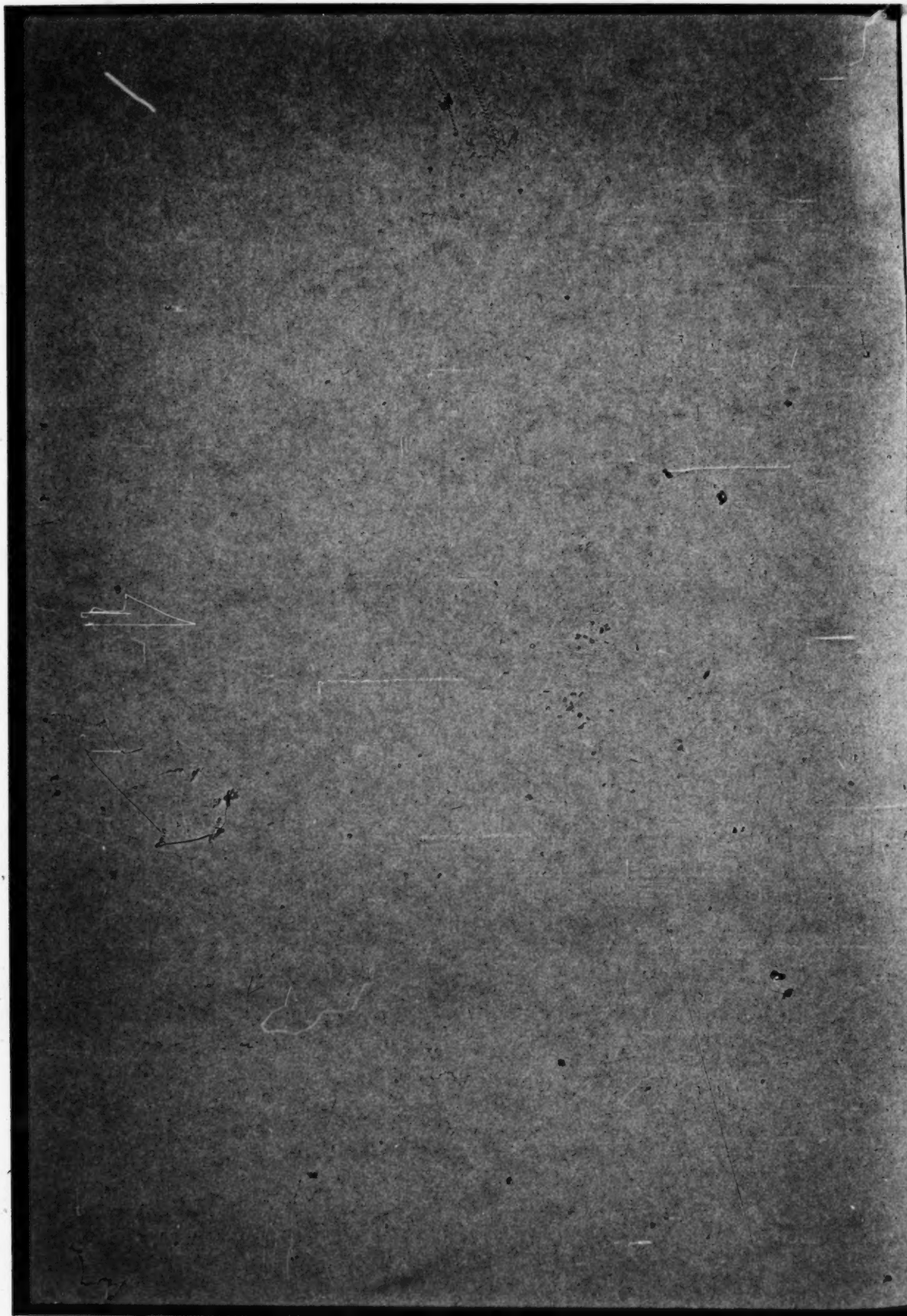

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The petitioners National Knitted Outerwear Association, National Association of Wool Manufacturers and Northern Textile Association hereby petition the Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this proceeding on March 26, 1969.

This petition is being filed simultaneously with a petition of the Solicitor General, on behalf of the

Federal Trade Commission, seeking review of the identical judgment entered below, sub nom. *Federal Trade Commission* v. *Textile and Apparel Group, American Importers Association, et al.* The Federal Trade Commission is named herein as a nominal respondent, just as the instant petitioners are nominal respondents in the case being docketed by the Solicitor General. The petitioners herein were allowed to intervene as parties defendant in the District Court proceedings and participated as parties appellee in the Court of Appeals proceedings, being aligned with the Federal Trade Commission.

As a result of the two cases being docketed simultaneously, this petition does not contain the opinion and judgment below as an appendix hereto. Those documents are to be found in the appendix of the accompanying petition of the Solicitor General.[1]

OPINION BELOW

The opinion of the Court of Appeals, rendered on March 26, 1969, is reported at 410 F. 2d 1052. No opinion was rendered by the District Court; its orders in the case are unreported.

JURISDICTION

The judgment of the Court of Appeals was entered on March 26, 1969. On June 16, 1969, Chief Justice Warren signed an order extending the time for filing this petition for certiorari to and including August 23, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

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[1] In these circumstances, petitioners hereby move for leave to omit the reproduction of the opinion and judgment as an appendix to this petition.

QUESTION PRESENTED

Whether the Wool Products Labeling Act of 1939, 15 U.S.C. § 68 et seq., authorizes the Federal Trade Commission, acting in cooperation with the Bureau of Customs, to promulgate and enforce a regulation, known as Rule 36 (16 C.F.R. § 300.36), requiring the disclosure of information as to the content of wool products being imported into the United States and, where there is reason to believe that such products may be misbranded, requiring inspections and tests of those products.

STATUTORY PROVISIONS INVOLVED

Wool Products Labeling Act of 1939, 15 U.S.C. § 68 et seq:

Section 6 [15 U.S.C. § 68d]:

ENFORCEMENT OF THE ACT

SEC. 6. (*a*) Except as otherwise specifically provided herein, this Act shall be enforced by the Federal Trade Commission under rules, regulations, and procedure provided for in the Federal Trade Commission Act.

The Commission is authorized and directed to prevent any person from violating the provisions of this Act in the same manner, by the same means, and with the same jurisdiction, powers, and duties as though all applicable terms and provisions of the Federal Trade Commission Act were incorporated into and made a part of this Act; and any such person violating the provisions of this Act shall be subject to the penalties and entitled to the privileges and immunities provided in said Federal Trade Commission Act, in the same manner, by the same means, and with the same jurisdiction,

powers, and duties as though the applicable terms and provisions of the said Federal Trade Commission Act were incorporated into and made a part of this Act.

The Commission is authorized and directed to make rules and regulations for the manner and form of disclosing information required by this Act, and for segregation of such information for different portions of a wool product as may be necessary to avoid deception or confusion, and to make such further rules and regulations under and in pursuance of the terms of this Act as may be necessary and proper for administration and enforcement.

The Commission is also authorized to cause inspections, analyses, tests, and examinations to be made of any wool products subject to this Act; and to cooperate with any department or agency of the Government, with any State, Territory, or possession, or with the District of Columbia; or with any department, agency, or political subdivision thereof; or with any person.

(b) Every manufacturer of wool products shall maintain proper records showing the fiber content as required by this Act of all wool products made by him, and shall preserve such records for at least three years.

The neglect or refusal to maintain and so preserve such records in unlawful, and any such manufacturer who neglects or refuses to maintain and so preserve such records shall forfeit to the United States the sum of $100 for each day of such failure, which shall accrue to the United States and be recoverable in a civil action.

* * * * * * * * *

Section 8 [15 U.S.C. § 68f]:

EXCLUSION OF MISBRANDED WOOL PRODUCTS

SEC. 8. All wool products imported into the United States, except those made more than twenty years prior to such importation, shall be stamped, tagged, labeled, or otherwise identified in accordance with the provisions of this Act, and all invoices of such wool products required under the Act of June 17, 1930 (c. 497, title IV, 46 Stat. 719), shall set forth, in addition to the matter therein specified, the information with respect to said wool products required under the provisions of this Act, which information shall be in the invoices prior to their certification under said Act of June 17, 1930.

The falsification of, or failure to set forth, said information in said invoices, or the falsification or perjury of the consignee's declaration provided for in said Act of June 17, 1930, insofar as it relates to said information, shall be an unfair method of competition, and an unfair and deceptive act or practice, in commerce under the Federal Trade Commission Act; and any person who falsifies, or fails to set forth, said information in said invoices, or who falsifies or perjures said consignee's declaration insofar as it relates to said information, may thenceforth be prohibited by the Commission from importing, or participating in the importation of, any wool products into the United States except upon filing bond with the Secretary of the Treasury in a sum double the value of said wool products and any duty thereon, conditioned upon compliance with the provisions of this Act.

A verified statement from the manufacturer or producer of such wool products showing their fiber content as required under the provisions of this Act may be required under regulations prescribed by the Secretary of the Treasury.

STATEMENT OF THE CASE

The nature of this case and the procedural events leading to the judgment below are fully set forth in the petition filed by the Solicitor General and will not be repeated here.

Suffice it to add that the instant petitioners, associations representing domestic manufacturers of wool products, were allowed without opposition to intervene in the proceedings in the District Court as parties defendant. App. 65. Such intervention was premised on the fact that the petitioners represented interests "which Rule 36, issued by the Federal Trade Commission under said [Wool Products Labeling] Act, was designed to protect from unfair competition caused by mislabeled articles imported into the United States." App. 65. In their capacity as intervening defendants, these petitioners duly filed an answer that denied all allegations of respondents' complaint that the Commission lacked statutory authority to promulgate and enforce its Rule 36. App. 76.

Subsequently the petitioners noted an appeal from the order of the District Court granting a preliminary injunction against the enforcement of Rule 36. That appeal was docketed and then abandoned, however, when the District Court refused to grant any final relief and instead ordered that the complaint be dismissed. In connection with that subsequent and final action by the District Court, the petitioners had filed a motion to dismiss the action for lack of jurisdiction, asserting *inter alia* that no justiciable case or controversy was presented by the complaint. App. 119. The petitioners, additionally, had indicated their agreement and joindure with the motion of the Federal Trade Commission to dismiss the action or, alternatively,

for summary judgment. The District Court granted both the petitioners' motion to dismiss and the Commission's motion for summary judgment. App. 121. The complaint was thereby dismissed and the statutory validity of Rule 36 was sustained.

The petitioners continued to participate fully as parties to the appeal by respondents from the District Court order. As parties appellee, they fully briefed and argued both the jurisdictional and substantive issues involved in the appeal and shared the oral argument with the Federal Trade Commission. The Court of Appeals, after consideration, rejected all the arguments advanced by both the petitioners and the Commission and ordered that the enforcement of Rule 36 be permanently enjoined.

REASONS FOR GRANTING THE WRIT

The reasons advanced by the Solicitor General in the companion petition fully justify the grant of certiorari to review the decision below. The reasons here presented serve mainly to underscore the dubious nature of the lower court's reading of the Wool Products Labeling Act and the resulting serious impact upon the consumers' concern that wool imports be properly labeled.

1. The Decision Below Raises Significant Questions of Statutory Construction and of Administrative Power To Execute the Will of Congress.

Congress has made its intention clear in Section 8 of the Wool Products Labeling Act, 15 U.S.C. § 68f, that "All wool products imported into the United States...shall be stamped, tagged, labeled, or otherwise identified in accordance with the provisions" of the Act. That means, of course, that all imported

products must be properly and correctly labeled as to their contents. And that requirement further means, as the heading of Section 8 indicates,[2] that misbranded or mislabeled wool products from abroad are to be excluded from entry into the United States. The ruling of the Court of Appeals that the Federal Trade Commission lacks any statutory power to implement Section 8 by such means as Rule 36 creates a variety of statutory construction problems warranting consideration by this Court.

A.

As stated by the Commission in promulgating Rule 36 (App. 37), the action was taken pursuant to the authority given to the Commission *in the last two paragraphs* of Section 6(a) of the Wool Products Labeling Act, 15 U.S.S. § 68d. Those paragraphs authorize the Commission (1) to make rules and regulations for the manner and form of disclosing information required by the Act, (2) to make such "further" rules and regulations pursuant to the terms of the Act as may be "necessary and proper" for administration and enforcement, (3) to cause inspections, analyses, tests and examinations to be made of any wool products subject to the Act, and (4) to cooperate with any department or agency of the Government in the execution of those powers.

The obvious problem thus raised, one not adequately analyzed by the court below, is whether any or all of these four specific authorizations may be utilized by the Commission to implement the foreign importation provisions of Section 8. The court below brushed aside those authorizations by referring only to the second

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[2] The heading of Section 8 reads: "Exclusion of misbranded wool products."

one above-mentioned, the rather general power to issue "further" rules "necessary and proper" for the administration of the Act. But the more precise powers specified in (1), (3) and (4) above would appear to be the ones that underlie the promulgation of Rule 36, with its requirements for the disclosure of information and for the testing of products suspected of being mislabeled, all to be performed in cooperation with the Bureau of Customs. If that be true, the authorization for Rule 36 is plain and unmistakable.

B.

The assumption of the court below, pressed upon it by the respondents, was that the only enforcement powers of the Commission are to be found *in the first two paragraphs* of Section 6(a). Those paragraphs provide that, "Except as otherwise specifically provided herein," the Act shall be enforced by the Commission under the rules, regulations and procedure provided for in the Federal Trade Commission Act, and that the jurisdiction, powers and duties of the Commission shall be the same under the Wool Products Labeling Act as though the provisions of the Federal Trade Commission Act were incorporated therein.

Hence, the argument goes, the Commission cannot utilize any of the customs-type enforcement procedures set forth in Rule 36. Those procedures are not authorized by the Federal Trade Commission Act, Section 5 of which limits enforcement techniques to full-scale adversary procedures on the issue of misbranding, augmented by judicial review of the administrative determination. 15 U.S.C. § 45.

Such a reading of Section 6(a), limited as it is to the first two paragraphs thereof, overlooks the addi-

tional and specific provisions of the last two paragraphs. Indeed, the first two paragraphs are prefaced by the cautionary phrase "Except as otherwise specifically provided herein." And among what is "otherwise specifically provided herein" are the specific authorizations in the last two paragraphs to do exactly what Rule 36 provides—to require the disclosure of information, to cause inspections and tests to be made, and to do so in cooperation with other agencies of the Government when appropriate.

C.

Closely related to the problem of reading and giving effect to all the enforcement techniques set forth in the various paragraphs of Section 6(a) is an appreciation of why the enforcement provisions of the Federal Trade Commission Act may not always be appropriate or necessary in the administration of the Wool Products Labeling Act. Much of the latter Act, like the Federal Trade Commission Act in its relevant entirety, is directed toward the introduction "into commerce" within the United States of misbranded products. Thus as to misbranded wool products that are sold or distributed in such commerce it is both practical and meaningful, as Congress has recognized in the first two paragraphs of Section 6(a), to utilize the jurisdictional and enforcement powers of the Federal Trade Commission Act, limited as it is to "in commerce" situations.

But the foreign import provisions of Section 8 of the Wool Products Labeling Act find no counterpart in the Federal Trade Commission Act. The latter statute is simply not designed to deal with misbranded products seeking entry from abroad. And when Congress deals with such imports, as it has in Section 8,

it is exercising its foreign commerce power under the Constitution, a power more plenary in nature than its interstate commerce power. *Buttfield* v. *Stranahan,* 192 U.S. 470; *Board of Trustees* v. *United States,* 289 U.S. 48. This Court has consistently recognized that the implementation of that plenary power can, consistent with the Constitution, call into operation much broader enforcement techniques, some of them *ex parte* and highly discretionary in nature. See *Buttfield* v. *Stranahan,* 192 U.S. at 493; and concurring opinion of Mr. Justice Frankfurter in *Joint Anti-Fascist Committee* v. *McGrath,* 341 U.S. 123 at 167. The long-established enforcement routines of the Customs authorities illustrate those broader techniques.

Thus it is fair to read the last two paragraphs of Section 6(a) as a recognition by Congress that different and broader enforcement powers may become necessary when dealing with the importation proscriptions of Section 8. The more restricted procedures of the domestic-oriented Federal Trade Commission Act simply do not fit the necessities of dealing with foreign misbranded wool products before their entry into domestic commerce. Almost by definition, the more *ex parte* powers of the type traditionally exercised by Customs authorities must be utilized. Among those powers are the ones announced in Rule 36—information disclosure, detention, testing and release. And those powers are ones that can best be exercised in cooperation and coordination with the Bureau of Customs, as Rule 36 recognizes and as Section 6(a) authorizes. Since those powers, when executed in cooperation with Customs authorities, may fairly be said to have been given the Commission in the last two paragraphs of Section 6(a) it follows that the Commis-

sion's Rule 36 is but a delegated exercise of Congressional power over foreign imports.[3]

Significantly, Chairman Dixon of the Commission reflected this foreign commerce basis underlying Rule 36. In his separate statement accompanying the promulgation of Rule 36, he cited and quoted from *Buttfield* v. *Stranahan, supra,* with its recognition of the plenary power of Congress over the terms and conditions of entry of foreign imports. App. 81-83; 32 Fed. Reg. 15183. And he further noted the similarity between what the Commission had done in Rule 36 in execution of its Section 6(a) authority and what Congress had directly done itself in 21 U.S.C. § 381—dealing with misbranded food, drugs and hazardous substances seeking entry into the United States. See *Sugarman* v. *Forbragd,* 267 F. Supp. 817 (N.D. Cal.), affirmed 405 F. 2d 1189 (C.A. 9), certiorari denied 395 U.S. 960. In short, the Chairman revealed both the constitutional and statutory theory upon which Rule 36 rests, a theory which the court below neither recognized nor utilized as a means of evaluating the validity of Rule 36.

The failure of the Court of Appeals to understand, to analyze and to evaluate the true power which the Commission here sought to exercise, combined with its

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[3] So reading the authorization given the Commission in the last two paragraphs of Section 6(a) renders irrelevant the failure of Congress to include in the Wool Products Labeling Act the importer section of S. 3502, a failure so heavily relied upon by the court below to support its view that Congress did not intend to grant the Commission the powers sought to be exercised in Rule 36. That failure, at best ambiguous in its implications, can be explained by the fact that the powers that were given the Commission in the last two paragraphs of Section 6(a) were quite sufficient to deal with foreign import problems; hence the provision is S. 3502 was unnecessary.

parochial and incomplete reading of Section 6(a), plainly calls for the invocation of this Court's review powers.

2. The Decision Below Adversely Affects the Public Interest in Being Protected Against Mislabeled Foreign Wool Imports.

As the Solicitor General's petition has noted, the decision below has significantly restricted the Commission's ability to enforce the Wool Products Labeling Act with respect to imported wool products. The Commission—and the consuming public—has been deprived of effective means to keep mislabeled imported wool products off the market.

The influx of wool products from abroad is a matter of no small dimensions. In each year following the enactment of the Wool Products Labeling Act in 1939, such imports have dramatically increased. In 1965, for example, imports of wool textiles and apparel rose 54% over the level of 1964; and such 1965 imports represented over 25% of the consumption of wool products that year in the United States.[4]

The importation of wool products, of course, carries with it the inevitable problems of misbranding. And just as the imports have increased, so have the misbrandings. As stated in an affidavit before this Court (App. 102) by a representative of the Commission's Bureau of Textiles and Fur:

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[4] Statement of Sidney S. Korzenik, Executive Director and Counsel of the National Knitted Outerwear Association, before the Federal Trade Commission in support of the proposed Rule 36 (Oct. 26, 1966). He also noted that the 25% consumption figure above-mentioned may be higher as to particular types of wool products. Thus in 1965 as many women's wool sweaters were imported into the American market from abroad as were manufactured here.

"The importation of misbranded wool products into the United States in recent years has become a serious problem and a matter of increasing concern to numerous government agencies and private parties alike. Substantial quantities of imported wool products have been labeled as containing highly desirable fibers commanding a premium price. Often cheaper fibers have been substituted and consumers receive inferior products. Such misbranding has been minimized among domestic producers through record keeping requirements and periodic inspections under the Wool Products Labeling Act of 1939. In view of the obvious jurisdictional limitations of that statute, such requirements cannot be effectively imposed upon manufacturers situated in foreign countries. This results in the safeguards against misbranded wool products provided by inspection of manufacturers' records and premises under the Act not being effective with respect to foreign manufacturers. The inability to control effectively the importation of misbranded wool products not only works to the obvious detriment of American consumers but also places honest American producers at a serious economic disadvantage. Rule 36 is an effort by the Commission, after extensive formal and informal programs and the above-noted rule making proceedings, to ameliorate the serious problem presented by the importation of misbranded wool products and to achieve some sort of equality in the Commission's enforcement programs as directed toward both domestically produced goods and imported goods."

The growing problem of misbranded wool imports is easily confirmed. A few years ago the National Knitted Outerwear Association, one of the petitioners herein, undertook spot testing of imported wool knitwear. Fifty knitted garments were at that time selected at random from counters of retail stores in various American cities and subjected to laboratory

tests for verification of the accuracy of the labels they bore. Without exception, each of the fifty garments was found to be mislabeled in violation of the standards of the Wool Products Labeling Act.[5]

The American consumers of wool products are thus in urgent need of protection from foreign misbranded products, a protection which they now receive only as to domestic products. The decision below not only has deprived them of that needed protection but has cast serious doubts on the power of the Commission and the Customs authorities to provide any kind of effective protection absent further legislation. The obvious importance of this problem warrants the attention of this Court through review of the decision below.

CONCLUSION

For these various reasons, supplementing those presented by the Solicitor General, a writ of certiorari should issue to review the judgment below.

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[5] Statement of Sidney S. Korzenik, footnote 4, *supra*.